93-771

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MICHAEL H. HUNT, SERGEANT, United States Army, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

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November 1993

QUESTIONS PRESENTED

I

Whether the government's use of "on or about" language (e.g., "on or about October 20, 1989") in a criminal charge violates the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution where the accused gives pretrial notice of an alibi defense and the government fails to provide notice of rebuttal witnesses and merely proves a date "reasonably near" the pleaded date.

II

Whether notice of an alibi defense makes the date of the criminal offense a material element which requires the government to affirmatively prove the date pleaded at trial to avoid unfair surprise to the accused in violation of the Fifth and Sixth Amendments of the United States Constitution.

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IN THE

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UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Michael H. Hunt, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 37 M.J. 344 (C.M.A. 1993) (Appendix A). The opinion of the United States Army Court of Military Review is reported at 34 M.J. 779 (A.C.M.R. 1992) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 18, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259 (3) (Supp. 1992).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .
>
> Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
>
> Amendment XIV, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On April 30, and May 1 and 2, 1990, Sergeant [hereinafter SGT] Michael Hunt was tried at Fort Dix, New Jersey, by a general court-martial composed of officer and enlisted members [hereinafter the jury].[1] Contrary to his pleas, SGT Hunt was convicted of rape, larceny, two counts of assault, adultery, and engaging in conduct of a nature to bring discredit upon the

[1] Court-martial members are analogous to jurors.

Armed Forces, in violation of Uniform Code of Military Justice [hereinafter U.C.M.J.] arts. 120, 121, 128, and 134, 10 U.S.C. §§ 920, 921, 928, and 934 (1988), respectively. The jury sentenced SGT Hunt to a dishonorable discharge, confinement for 14 years, forfeiture of all pay and allowances, and reduction to the lowest enlisted pay grade. On June 22, 1990, the convening authority approved the sentence.[2] On February 28, 1992, the United States Army Court of Military Review [hereinafter Army court] affirmed the findings and the sentence. Thereafter, on August 18, 1993, the United States Court of Military Appeals agreed with the Army court and reaffirmed the findings and the sentence.

Prior to trial, the defense counsel gave notice under Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial [hereinafter R.C.M.] 701 (b) (1) of an alibi defense for the date listed on the charge sheet.[3] At trial, without prior notice to the defense, the government proved a date other than that alleged in the charge sheet. The defense moved for a directed verdict, noting a fatal variance between the pleadings and the proof. The military judge denied the motion.

On appeal, the United States Army Court of Military Review held that a four week difference between the date alleged and that proved did not mislead the appellant, that the appellant had sufficient notice of the charged incident to defend against it, that the appellant was protected from another trial for the same offense and that the appellant had waived the issue by failing to complain about indefiniteness at trial. The issues of an alibi defense and its effect on the general variance

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[2] The commanding general, who initially convenes the court-martial, is also the accused's first avenue of appeal and clemency.

[3] The charge sheet is the military's functional equivalent to the information or indictment in civilian courts.

rules were never addressed. *United States v. Hunt*, 34 M.J. 779 (A.C.M.R. 1992).

The Court of Military Appeals agreed with the Army court and noted that military practice followed the federal practice when it came to variance law. The only mention of alibi in the court's opinion is the statement that the appellant's "attempt . . . is to no avail." *United States v. Hunt*, 37 M.J. 344, 348 (C.M.A. 1993).

REASONS FOR GRANTING THE WRIT

I. *Overview*

The questions presented in this case are whether, in light of the purpose of requiring notice of an alibi defense, and the due process requirements of the Fifth and Sixth Amendments, allowing the government to prove any date within a few weeks of an "on or about" date is fundamentally unfair when the government is on notice that the accused intends to rely upon an alibi defense. Such a holding effectively precludes any use of an alibi defense even when, as in this case, notice of the defense is given in advance of trial.[4]

The Fifth and Fourteenth Amendments provide that all persons accused by the government of commiting criminal offenses will not "be deprived of life, liberty, or property, without due process of law." Thus, "criminal prosecutions must comport with prevailing notions of fundamental fairness." *California v. Trombetta*, 467 U.S. 479, 485 (1984). *See also Rochin v. California*, 342 U.S. 165, 172 (1952) (governmental conduct which "shocks the conscience" or "offend[s] even hardened sensibilities" violates due process). When the

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[4] In essence, petitioner asks whether the government should be permitted to use the notice of alibi defense as the sword of surprise it expressly prohibited the defense from using by creating the notice rules in the first place.

government "brings its judicial power to bear" on an individual, an accused must be given a meaningful opportunity to present his defense and must be treated fairly and evenhandedly by his accusers. *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

This Court has further recognized an accused's Sixth Amendment right to present a defense. *Rosen v. United States*, 245 U.S. 467 (1918). Using *Rosen* as a foundation, in *Washington v. Texas*, 388 U.S. 14, 22 (1967), this Court opined that "the Sixth Amendment was designed in part" to allow an accused the right to defend himself against his accusers. This concept was ratified by this Court in *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Rock v. Arkansas*, 483 U.S. 54 (1987). More specifically, Justice Powell wrote that due process in a criminal case demands that the accused be given "a fair opportunity to defend against the State's accusations." *Chambers*, 410 U.S. at 294.

For these reasons, this Court held that the constitutionality of a state imposed "notice-of-alibi" rule was contingent on "reciprocal discovery." *Williams v. Florida*, 399 U.S. 78, 82 n.11 (1970). More specifically, this Court held in *Wardius v. Oregon*, 412 U.S. 470, 472 (1972), that "the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants." This Court explained:

> Notice-of-alibi rules, now in use in a large and growing number of States, are based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial. . . . Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be

> afforded, [citations omitted], it does speak to the balance of forces between the accused and his accuser. . . . This Court has therefore been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial.

Id. at 473-74, n.6. The notice-of-alibi rule in the U.S. military, R.C.M. 701(b)(1), provides for reciprocal discovery of government witnesses who will rebut the alibi. R.C.M. 701(a)(3)(B).

II. *Statement of Facts*

The government charged SGT Hunt with raping the alleged victim "on or about 20 October 1989." At the U.C.M.J., Article 32 hearing,[5] the evidence provided by the government was that the date of the rape was consistent with this October 20 date. In fact, the victim testified that the rape occurred 3-4 weeks prior to Thanksgiving. Thereafter, three additional fresh complaint witnesses testified that the rape occurred either around the 20th of October or in October.

After this hearing, where the evidence of the October 20 date was heavily corroborated, the defense counsel gave a Notice of Alibi Defense for the October 20 date under R.C.M. 701(b)(1) to the government. Upon receipt of the Notice, the government did not amend the October 20 date on the charge sheet, nor did it give notice of government witnesses who

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[5] The U.C.M.J., Article 32 hearing has no functional equivalent in the civilian sector, although some scholars have compared it to the preliminary probable cause hearing in felony cases. However, the Article 32 hearing is much broader than an inquiry into probable cause. Whereas in the civilian sector, the prosecutor puts on only limited evidence to establish probable cause, the military prosecutor puts on nearly the entire case. The hearing puts the defense on notice of all key facts which the government intends to prove at trial.

would specifically rebut the alibi. Instead, it proceeded to trial with the full knowledge that the defense was not on notice of a date different from that originally charged.

At trial, without prior notice to the defense and in front of the jury, the government offered evidence which changed the date of the offense to the 26th of September. This change came through the testimony of a government witness who did not testify at the Article 32 hearing and whose prior written statements did not pertain to the rape charge. The victim was then allowed to change her Article 32 testimony at trial to accommodate the new date. Although the trial defense counsel proceeded to put on a viable alibi defense for the 20th of October, the defense became a nullity given the evidence of a distinctly different date of the offense.[6] Hence, the case-in-chief witnesses acted to rebut both the Article 32 testimony of four government witnesses and the date on the charge sheet.

Following the presentation of the evidence, the defense counsel moved for a directed verdict due to a fatal variance between the pleadings and the proof presented at trial. Counsel noted that he was not on prior notice of the new date and had prepared for trial under the assumption that the old date was valid. He argued that the Article 32 hearing had not provided notice of the change and that the new date unfairly destroyed SGT Hunt's sole defense, that of alibi.

The military judge ruled that the government was allowed to prove any date within the statute of limitations because it had chosen to charge petitioner with committing the offense "on or about" a certain date. The October 20 date in the charge sheet was not amended to reflect the date proved at trial.

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[6] Petitioner's alibi defense would have been bolstered by the victim's inability to identify SGT Hunt as her attacker, as well as her numerous inconsistent pretrial statements.

On appeal, the United States Army Court of Military Review held that the variance in this case did not fit within one of the fatal variance criteria noted in *United States v. Freeman*, 23 M.J. 531 (A.C.M.R. 1986), *pet. denied*, 26 M.J. 290 (C.M.A. 1988). The Army court did not address how an alibi defense played into the language of *Freeman*. Aside from *Freeman*, the Army court concluded that the absence of a motion for a bill of particulars had waived the issue. *Hunt*, 34 M.J. at 781-82.

The Court of Military Appeals held that the government is not required to prove an exact date when it chooses to charge an accused with committing an offense "on or about" a certain date. The court relied upon numerous federal and military cases to substantiate its view. *None* of those cases, however, dealt with the effects of an alibi defense on variance law. The court completely ignored petitioner's argument on appeal, choosing not to address the constitutional concerns raised by alibi defenses or the fairness of allowing the government to knowingly lie in wait to sabotage an accused's sole defense. *Hunt*, 37 M.J. at 347-48.

III. *Variance Law and the Alibi Defense in Military and Federal Courts*

The military follows the federal practice of allowing the government to prove any date within the statute of limitations as long as the government has elected to charge an accused with the commission of a crime "on or about" a certain date. *Hunt*, 37 M.J. at 347 (*citing United States v. Brown*, 34 M.J. 110 (C.M.A. 1992); *United States v. Nersesian*, 824 F.2d 1294, 1323 (2d Cir.), *cert. denied*, 484 U.S. 957 (1987)). This practice, however, as both military and federal courts point out, is not without its exceptions. *Freeman*, 23 M.J. at 538; *United States v. Goodrich*, 493 F.2d 390, 394 (9th Cir. 1974). Indeed, *Freeman* specifically points out that "there is an

exception to this general rule when time is of the essence to the charged offense." 23 M.J. at 538. Simply put, where the date of the offense becomes material to prove or disprove the case, the government must prove what it pleads.

Numerous courts have discussed the situation when time becomes of the essence. All seem to agree that time is of the essence where the accused "is charged with several similar acts at the same place," or "when it may change the nature of the offense or alter the maximum permissible punishment." *Id.; see also United States v. Duke*, 940 F.2d 1113, 1120 (8th Cir. 1991) (exception where the date becomes a material element of the offense); *United States v. Cochran*, 697 F.2d 600, 604 (5th Cir. 1983) (exception where double jeopardy is an issue). The problem within both the military and most of the federal courts is that none has definitively ruled whether time is of the essence when the defense gives notice of an alibi defense.

The Ninth Circuit held in *Goodrich* that "when an alibi defense is asserted, the time of the crime is extremely material, since any variance in time proved and the time the jury is allowed to find, deprives the defendant of his alibi defense." That case dealt with a situation where the government charged the accused with committing an offense "on" a specific date. 493 F.2d at 393. The distinguishing factor is "on," as opposed to "on or about." This distinction has had specific ramifications in other variance cases; none of those cases, however, dealt with the defense of alibi.

The Third Circuit in *United States v. Somers*, 496 F.2d 723, 746 (3rd Cir. 1973), was tempted, but elected not to address this standard for variance inquiries where alibi is raised. Hence, although that court implied that the standard should change, it made no definitive ruling.

Likewise, the Fourth Circuit noted in *United States v. Covington*, 411 F.2d 1087, 1088 (4th Cir. 1969), that when

"time is of the essence," the general rule allowing the government to prove any date within the statute of limitations is modified. There, the appellant contended for the first time on appeal that he had an alibi defense which was prejudiced by the variance. The court rejected this eleventh hour assertion, but noted that if the appellant had raised this at trial, "a claim of fatal variance prejudicing the preparation of a defense might [be] valid." *Id.* at 1089.

Hence, the question of alibi has not been fully answered by the federal or military courts. **The cases quoted by the Court of Military Appeals to support its ruling are military and federal variance cases, but none deal with the defense of alibi.** For this reason, an inquiry into how the states deal with this issue is required.

IV. *Variance and the Alibi Defense in the State Courts*

State courts center their attention on "materiality." The majority agree that when notice of an alibi defense is given, time becomes a material factor. *See Commonwealth v. Boyer,* 216 Pa. Super. 286, 264 A.2d 173 (1970) (notice of alibi defense makes "time of the essence"); *Deaton v. State,* 242 So.2d at 452 (Miss. 1970) ("time may or may not be of the essence of an offense when an alibi defense is presented, depending upon the circumstances of the particular case"); *State v. Cooper,* 201 P.2d 764, 769 (Utah 1949) ("the issue of time may be very important where the defendant's defense is alibi"); *State v. Pace,* 212 P.2d 755, 759 (Or. 1949) ("time particularly becomes material where an alibi is claimed"); *State v. Whittemore,* 255 N.C. 583, 122 S.E.2d 396 (1961) (time is of the essence where there is an alibi defense); *State v. Severns,* 13 Wash. 2d 542, 125 P.2d 659 (1962) (time is of the essence when the accused has an alibi defense); and *Esquibel v. State,* 399 P.2d 395, 399 (Wyo. 1965) (where an alibi defense was raised, the "time of the offense became critical. It could no longer be regarded as immaterial."). *But see MJS v. People,* 478 P.2d 720

(Colo. App. 1970); and *People v. Smith*, 58 Mich. App. 76, 227 N.W.2d 233 (1975).

Of those jurisdictions which accept that alibi defenses make the date of the offense material, the majority mandate that once notice of an alibi is given, the date charged becomes fixed. As such, the government must prove that date at trial or a fatal variance occurs. *See United States v. Waid*, 92 Utah 297, 67 P.2d 647 (1937) (where the accused has an alibi defense, the government does not have unlimited discretion in proving any date within the statute of limitations, but instead must stick to just one date); *People v. Waits*, 18 Cal. App. 2d 20, 62 P.2d at 1054 (1936) ("in light of the appellant's alibi defense, the time the alleged offenses were committed became material, and it was the duty of the trial court to limit the jury in its consideration of the evidence to the period which the prosecution selected as the time for the commission of the offenses"); *Quillen v. State*, 391 N.E.2d 817 (Ind. 1979) (notice-of-alibi fixes the date of the offense to the date charged)[7]; and *Van Norman v. State*, 365 So.2d 644 (Miss. 1978) (alibi defense fixes the date on the indictment).

The requirement in alibi cases that the government be required to prove the date charged does not vary with the manner in which the government has elected to charge an accused. Hence, it makes no difference whether she or he was charged "on or about" a certain date or simply "on" a specific date. *See Waid*, 92 Utah at 297, 67 P.2d at 647 (charged "on or about"); *Boyer*, 216 Pa. Super. at 286, 264 A.2d at 173 (originally charged "on or about"); *Wilson v. State*, 515 So.2d 1181, 1182 (Miss. 1987) (charged "on or about"); *Whittemore*, 255 N.C. at 583, 122 S.E.2d at 396 (charged "on or about"); *State v. Bowles*, 360 S.W.2d 706, 707 (Mo. 1962) (charged "on or about"); *Esquibel*, 399 P.2d at 395 (charged "on or about"); *State v. Poindexter*, 21 N.C. App. 720, 205 S.E.2d at 145 (1974)

[7] Indiana operates under an Alibi Notice statute which mandates that the government prove the date charged at trial.

(charged "on"); and *Caldwell v. State*, 139 Ga. App. 279, 228 S.E.2d 219, 221 (1976) (charged "on"). The elimination of the distinction between these charging tactics is only logical given the parameters of the Fifth Amendment. The government should not be permitted to "skirt" an accused's constitutional rights through the use of a legal fiction. The reasoning of the state courts is clear: to allow the government to charge one date and prove another when there is an alibi defense deprives an accused of his Sixth Amendment right to present a defense. *Bowles*, 360 S.W.2d at 709; *Poindexter*, 21 N.C. at 720, 205 S.E.2d at 145.

There are, however, a minority of states which, while noting the materiality of the date of the offense, do not find the variance fatal where it occurs. These courts put the onus on the defense counsel to make a motion for a continuance when there is a variance which impinges upon the validity of the alibi. *People v. Cook*, 136 Cal. App. 2d 442, 288 P.2d 602 (1955); *Caldwell*, 139 Ga. App. at 287, 228 S.E.2d at 224. Still other courts put the burden upon the trial judge to *sua sponte* inquire into granting a continuance or mistrial without prejudice to allow the defense time to re-think its defense theory. *State v. Pitts*, 62 Wash. 2d 294, 382 P.2d 508 (1963); *State v. Pierce*, 263 S.C. 23, 27, 207 S.E.2d 414, 416 (1974).

V. *Application to SGT Hunt*

Here, neither the Army court, nor the Court of Military Appeals addressed the true issue—that of alibi. Instead, each chose to rely upon the general variance rule without any analysis into the effect of an alibi defense. This can be seen in the numerous cases these two courts cite as controlling in their respective opinions. **None of the cases cited is an alibi case.** *Hunt*, 34 M.J. at 781-82; *Hunt*, 37 M.J. at 347-48.

As noted, there is no case law in the military dealing with variance and alibi. Federal courts seem to imply that an alibi defense should be one of the exceptions changing the general rule. However, none of the cases expressly holds such.

Where SGT Hunt was denied the opportunity to a fair trial and opportunity to present his defense under the Fifth and Sixth Amendments, it is reasonable for this Court to fill the vacuum in the military and federal courts, while settling the split in the states.

Petitioner asserts that the majority of state courts are correct. Where an accused tenders notice of an alibi defense, time is of the essence, and the government must fix the date it intends to prove at trial. Because the date becomes a material element of the crime, the failure to prove it is fatal. By mandating such a black letter rule, this Court can ensure that the Fifth and Sixth Amendment rights of an accused will be protected from sabotage by the government. To rule adversely would allow the government to surprise an accused. This is the kind of tactic which the notice provisions under *Williams* were meant to curb. Certainly the government should not be permitted to use its discovery of the defense theory to ambush the accused at trial. For this reason, the military mandates reciprocal discovery to comply with *Wardius*.

Nevertheless, in petitioner's case, SGT Hunt gave notice of an alibi defense, thus tipping his strategy to the government. The government, with full knowledge that it had not changed the charged date prior to trial, surprised the defense by changing the date of the offense at trial. It did this by, in effect, having the case-in-chief witnesses act as rebuttal witnesses to the Article 32 hearing. The government did this without reciprocal notice being given to SGT Hunt. This action violates the spirit of *Wardius* and was completely ignored by the military courts. As a direct result, petitioner's sole defense, that of alibi, was stifled. This scenario truly gives meaning to this Court's comment in *Wardius* that "[t]he State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses." 412 U.S. at 475.

CONCLUSION

The petition for certiorari should be granted. This Court is now given the opportunity to fill the vacuum created by the federal courts' refusal to address the issue of fatal variances where an alibi defense is raised. This Court can simultaneously settle the conflicting views on this issue within the states. Due process demands that an accused be given a fair opportunity to present his defense. This right cannot exist where the government is allowed to sabotage alibi defenses. The question of an alibi defense and its ramifications on variance law is substantial and of crucial public significance.

Respectfully submitted,

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November 1993

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 67,922
CMR No. 9001263

UNITED STATES, APPELLEE

v.

MICHAEL H. HUNT, SERGEANT
UNITED STATES ARMY, APPELLANT

Argued April 7, 1993
Decided Aug. 18, 1993

Counsel

For Appellant: *Captain David L. Thomas* (argued); *Colonel Malcolm H. Squires, Jr.* and *Major Fran W. Walterhouse* (on brief); *Colonel Robert B. Kirby, Captain Holly K. Desmarais, Captain Michael P. Moran.*

For Appellee: *Captain Samuel J. Smith, Jr.* (argued); *Colonel Dayton M. Cramer, Lieutenant Colonel Joseph A. Russelburg, Major Donna L. Barlett* (on brief).

Military Judge: EARL A. PAULEY

Opinion of the Court

SULLIVAN, Chief Judge:

On April 30, and May 1 and 2, 1990, appellant was tried by a general court-martial composed of officer and enlisted members at Fort Dix, New Jersey. Contrary to his pleas, appellant

was convicted of rape; larceny; two specifications of assault; adultery; and engaging in conduct of a nature to bring discredit upon the Armed Forces, in violation of Articles 120, 121, 128, and 134, Uniform Code of Military Justice, 10 USC §§ 920, 921, 928, and 934, respectively. He was sentenced to a dishonorable discharge, confinement for 14 years, total forfeitures, and reduction to Private E1. On June 22, 1990, the convening authority approved the sentence. The Court of Military Review affirmed the findings and the sentence on February 28, 1992. 34 MJ 779.

On October 13, 1992, this Court granted appellant's petition for further review on two issues. They are:

I

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT WHEN HE REFUSED TO DISMISS CHARGE I (RAPE) IN THAT THERE WAS A FATAL VARIANCE BETWEEN THE DATE OF THE ALLEGED RAPE RELIED UPON BY APPELLANT IN THE CHARGE SHEET AND AT THE ARTICLE 32(B) INVESTIGATION, AND THE DATE PROVEN BY THE GOVERNMENT AT TRIAL.

I

WHETHER THE EVIDENCE IS LEGALLY INSUFFICIENT TO PROVE CHARGE I (RAPE).

We decide both issues adversely to appellant. *See United States v. Brown*, 34 MJ 105 (CMA 1992) (variance); *United States v. Clark*, 35 MJ 432 (CMA 1992) (legal sufficiency).

Appellant was charged, *inter alia*, with the crime of rape in violation of Article 120. The specification of Charge I states:

> SPECIFICATION: In that SGT Michael H. Hunt, did, at Fort Dix, NJ, *on or about 20 October 1989*, rape PVT [KC].

(Emphasis added).

Defense counsel did not make a motion under RCM 906(b)(6), Manual for Courts-Martial, United States, 1984, for a bill of particulars or under RCM 906(b)(4) for amendment of this specification.

The following evidence was introduced during appellant's trial. Private (now Ms.) B testified that "in late September or early to middle October 1989" she and the alleged victim, Private (now Ms.) C, absconded from their company area during Advanced Individual Training in order to purchase cigarettes at a local inn. While at the inn, appellant (in civilian attire) approached B and C, ascertained their military status, and promised not to report their unauthorized absence. B and C then accepted his offer to given them a ride back to the barracks. In order to decrease the likelihood of detection, appellant told them to remove their military headgear. Appellant also switched vehicles to ensure that he would not be observed with trainees in his car. Then appellant suggested that they consume some alcohol, and he drove to a liquor store. Appellant had some alcohol in a bag in the back seat. B testified that after appellant covered the front windshield with a visor, appellant opened a bottle and all three drank from it.

In response to persistent questioning by B and C, appellant admitted that he was in the military and told them that he worked "in intelligence." Appellant also showed them a receipt bearing his name. His last name stood out to the two because it was the same as that of the female sergeant who was performing charge-of-quarters duties at their barracks that evening. At some point, appellant leaned over and kissed C.

C further testified that, although she was surprised by the kiss, she did not resist. Eventually appellant drove them back

to a parking lot near their barracks so they could return to the barracks before the doors were locked for the evening. Appellant suggested that B reconnoiter to see if B and C could get back in the building. C told B that she would follow shortly.

After B left the vehicle, C and appellant began kissing. Appellant unbuttoned C's pants, and he began fondling her genital area as she fondled appellant's penis outside of his trousers. He then moved over to her side of the car, put his weight on her chest, trapped her arms, and said, "Just let me stick it in." C testified that she repeatedly said "no" and told him to "get off" of her. While C was crying and imploring him to stop, appellant stuck his penis into her vagina. Appellant briefly withdrew his penis, and then he reinserted it.

B testified that she returned to the vehicle approximately 10 minutes after she had exited it. B knocked on the tinted window, and as she was walking away, C "stumbled out" of the car. C looked disheveled and appeared to be "fixing her uniform." C repeatedly said, "Oh, my God" as she ran to the barracks and then became physically ill. C then laid down on her bunk, was "totally unresponsive" to questions, and repeatedly said, "Oh, my God. Oh, my God" and "He wouldn't get off. He wouldn't get off. I told him to stop and he wouldn't stop." Later, when B asked C what had happened with appellant, C said that appellant had sex with her while she was resisting.

C testified that she reported the rape on October 20, 1989, 3 weeks after the incident.

At the close of the Government's case, defense counsel made a motion for a finding of not guilty pursuant to RCM 917. The record states:

> TC: Yes, Your Honor, if you could instruct the court members on the issue of variance of the dates. On the rape charge the allegation is for on or about 20 October, and the evidence, through the various

witnesses, has shown that it may well have been any date from around the 30th of September through the 20th of October. And if you could please instruct the members of the meaning of "on or about."

MJ: Okay.

DC: Your Honor?

MJ: Yes?

DC: If I may, that was going to be one of the other motions by the defense at the close of government evidence, is Rule 917 motion on the rape charge. Defense's position is that that is a fatal variance. It's not a minor one. There's a three-week discrepancy in the evidence that was presented at the 32 investigation versus the evidence that was presented in court.

MJ: Well now I don't know what was presented at the 32 investigation, not having been there and not really—and I'm not sure it makes any difference what was presented at the Article 32 Investigation.

DC: Well, Your Honor, the charges—

MJ: Why would that make a difference?

DC: Your Honor, the charges, as you know, in General Court-Martial, are reviewed by an investigating officer pursuant to RCM 405. The particular charge that was examined was a rape that was alleged on the 20th of October. And that was the charge recommended to be tried. The testimony at the 32 investigation would be important because if it tended to make the investigating officer believe that 20 October was the date that it occurred, then that was the date upon which he based his recommendation that the charges come to a GCM.

MJ: Well I don't see the point. Indeed, that may have been the day that it occurred. The government's

not saying that it didn't occur on that day. That's what "on or about" means, is on or about within a reasonable period of time from 20 October.

DC: Well, Your Honor, to sustain though—or to have an instruction on variance, there would have to be at least a finding by you that it was a minor—could be considered a minor variance to begin with. This is a three-week variance. The defense has presented an alibi witness on the date alleged in the pleadings by the government in anticipation that they would try to prove 20 October. Now even the government is stipulating that they're attempting to prove that it occurred three weeks beforehand. We gave the government notice of alibi before trial, as required by Rule 701, and our argument is that if they intended to prove that the rape occurred three weeks beforehand, they had a duty to interview that individual and let us know what was going on and change the charge, if necessary—

MJ: Okay, so your objection is really that the instruction would give them an idea that they can make more than a slight change.

DC: Yes, Your Honor, and three weeks is more than a slight change. That would be our argument. *And it prejudices the accused because we went to trial anticipating defending the 20th of October to the extent of being an alibi.* I don't know right now whether or not we could produce an alibi witness on late September—

MJ: Okay, well I'm—all right, I'm inclined to agree. I'm not going to give the variance instruction. Now you can certainly argue that—for the government—that "on or about" means exactly what it says it means, on or about. And, of course, the

> defense can argue that they've taken care of the 20th of October and didn't have an obligation to take care of any other day, or however, you'd like to argue. But I think that's properly a legitimate objection to the—and the instruction on variance is designed for the kind of thing to make minor changes. And, under the circumstances, the factual circumstances of this case, I would say that that's not a minor change, not to a degree. Now the 19th or 21st or whatever, within a few days of the 20th, I would say would not [sic] be minor. All right, what else? Anything else?

(Emphasis added.)

I

Appellant initially contends that the military judge erred when he refused to dismiss the rape charge against him because of a fatal variance between the date of the offense charged and the date of the offense proven at his court-martial. *See* RCM 917 (motion for finding of not guilty based on insufficient evidence). To prevail on a fatal-variance claim, appellant must show that the variance was material and that it substantially prejudiced him. *United States v. Lee*, 1 MJ 15, 16 (CMA 1975); *see United States v. Wray*, 17 MJ 375 (CMA 1984); *see also United States v. Nersesian*, 824 F.2d 1294, 1323 (2d Cir.), *cert denied*, 484 U.S. 957. In our view appellant has failed on both prongs of this test.

First, we note that there was no material variance, as a matter of law, in this case. Appellant was not charged with rape on October 20, 1989, but with rape "on or about October 20, 1989." The words "on or about" in pleadings mean that "the government is not required to prove the exact date, if a date *reasonably near* is established." *United States v. Nersesian*, *supra* at 1323 (emphasis added); *see United States v. Brown*, 34 MJ at 110. Here the evidence of record established that the offense of rape occurred within 3 weeks of October 20, 1989,

the date the rape was reported. In our view, this case does not present an improper material variance. *Cf. United States v. Nersesian, supra* at 1323 (no variance where "on or about June 1984" was alleged but offense was proven in July or August 1984); *United States v. Duke,* 940 F.2d 1113, 1119-20 (8th Cir. 1991) (no variance where day after arrest was alleged as "on or about" day of the offense); *United States v. Cochran,* 697 F.2d 600, 604 (5th Cir. 1983) (no variance where "on or about November 1, 1981" was alleged and September 1981 was proven).

Second, assuming a material variance occurred here as a matter of law, we still cannot find reversible error in the judge's denial of the motion for a finding of not guilty. To prevail on that motion appellant must show that he was prejudiced by the variance in this case. *United States v. Lee, supra* at 16; *see United States v. Duke, supra* at 1120. In this regard, we note that the record does not show that he was surprised at trial by the purported discrepancy in proof.[1] The Government utilized the "on or about" language in its referred charge and specification, which provided some pretrial notice to the accused, in the pleadings, concerning the date of the alleged offense. *See id.*; *United States v. Cochran, supra* at 604. Furthermore, the state of the Government's proof was readily apparent from the witness testimony and other evidence presented at the pretrial investigation under Article 32, UCMJ, 10 USC § 832, in which defense counsel participated.[2] *See also*

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[1] The charge and specification containing the "on or about" language was preferred by Captain Stone on January 4, 1990. It was investigated by Major Graham beginning on January 9, 1990. This same charge was referred to a general court-martial on March 19, 1990, and trial began on April 30, 1990. Appellant was represented by Captain Shaver, his counsel, both at the pretrial investigation under Article 32, Uniform Code of Military Justice, 10 USC § 832, and at the later court-martial.

[2] The vicim's initial pretrial statement was made on October 20, 1989, and she stated the rape occurred "[a]bout 1900, 3 weeks or so ago, I am

United States v. Brown, supra at 110; *United States v. Lee, supra* at 16. Finally, appellant made no motion for a more specific charge to defend against or requested a continuance to prepare such a defense. *United States v. Brown, supra*; *see United States v. Karl*, 3 USCMA 427, 12 CMR 183 (1953). Appellant's attempt to use his pretrial notice of alibi to bind the prosecution to a date which it did not particularly allege, and then claim surprise, is to no avail. *See also* RCM 701(b)(1), Discussion ("If the defense needs more detail as to the . . . date . . . of the offense . . . it should request a bill of particulars.").

II

We also find appellant's legal-sufficiency question to be without merit. Appellant's defense at this court-martial was based on C's credibility.[3] On appeal, he has changed tactics. Appellant now implies that as a matter of law the circumstances evidenced at trial fail to show lack of consent, or, at the very least, that the Government did not disprove beyond a reasonable doubt that appellant had acted under mistake of fact. We reject this invitation to substitute ourselves for the factfinder.

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unsure of the exact date." At the pretrial Article 32 investigation, she testified that it had occurred about 3 or 4 weeks before Thanksgiving.

The victim's friend provided a pretrial statement where she asserted that the victim's encounter with appellant occurred "[a]bout 1915, a couple of days before EOM Sep payday." At the pretrial investigation, she testified that the incident occurred sometime in October.

[3] Defense counsel at trial impliedly asserted an alibi defense in his opening statement. However, he subsequently moved for a not-guilty finding under RCM 917, Manual for Courts-Martial, United States, 1984, on the basis of a fatal variance. The motion was denied by the military judge. In his closing argument defense counsel simply attacked the victim's credibility on the basis of her inability to remember the exact date of the offense.

No authority has been posited for concluding that, as a matter of fact or law, there was consent by the victim, C, under the circumstances of this case. *See United States v. Clark*, 35 MJ 432, 433 (CMA 1992) (constructive force between instructor and trainee). Moreover, there is no evidence supporting a reasonable-mistake-of-fact defense in this case. *See United States v. Carr*, 18 MJ 297, 302 (CMA 1984) (unreasonable to disregard "no"); *cf. United States v. Baran*, 22 MJ 265 (CMA 1986). Finally, the evidence of record includes some legal and competent evidence upon which reasonable factfinders could find or infer each and every element of the charged offense beyond a reasonable doubt. That's enough.

The decision of the United States Army Court of Military Review is affirmed.

Judges COX, CRAWFORD, GIERKE, and WISS concur.

APPENDIX B

U.S. ARMY COURT OF MILITARY REVIEW

ACMR 9001263

UNITED STATES, APPELLEE

v.

SERGEANT MICHAEL H. HUNT, 261-49-0553,
UNITED STATES ARMY, APPELLANT

---

28 Feb. 1992

For Appellant: Matthew R. McCrink, David P. Perri, Captain Holly Desmarais, JAGC (on brief).

For Appellee: Colonel Dayton M. Cramer, JAGC, Lieutenant Colonel Daniel J. Dell'Orto, JAGC, Major Thomas E. Booth, JAGC, Major Daniel N. Velling, JAGC (on brief).

Before JOHNSON, WERNER and GRAVELLE, Appellate Military Judges.

OPINION OF THE COURT

WERNER, Judge:

Contrary to his pleas, the appellant was convicted by a general court-martial composed of officer and enlisted members of rape, larceny, two specifications of assault, adultery, and three other specifications alleging misconduct discrediting to the armed forces, in violation of Articles 120, 121, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 921, 928, and 934 (1982), respectively. The court sentenced

him to a dishonorable discharge, confinement for fourteen years, forfeiture of all pay and allowances, and reduction to Private E1. The convening authority approved the sentence.

The larceny and assault charges arose out of an incident that occurred on 6 July 1989, in which the appellant assaulted the wives of two soldiers and stole photographs from one of them. The appellant contends that the evidence is insufficient to establish these two charges. We disagree. The appellant was a noncommissioned officer assigned to an ordance training unit at Fort Dix, New Jersey. A trainee, Private T, asked him for assistance in obtaining on-post housing for Private T and his nineteen year-old-wife, Dionne, who was sharing a room at a local motel with another trainee's wife, Audra H, also nineteen. The appellant accompanied Dionne to her motel in order to examine certain documents belonging to Private T that would ostensibly have qualified him for on-post housing. Upon their arrival, Audra was in the motel room. Dionne showed the appellant a drawer full of papers and letters which he began to examine as he sat on one of the beds with Audra beside him. When Dionne went into the bathroom, the appellant suddenly pinned Audra to the bed, kissed her, placed his hand under her shorts and inserted his fingers into her vagina. Audra struggled to get away from the appellant but was not successful until he released her as Dionne exited the bathroom. Audra took Dionne outside the motel room, told her what had happened and the two decided to take the appellant back to post. When they reentered the room, the appellant grabbed Dionne by the arm, pulled her into the bathroom, and attempted unsuccessfully to kiss her. Dionne, accompanied by Audra, then drove the appellant back to post. During the drive, the appellant continually rubbed Audra's arm and asked her to go out with him.

The next day, the women reported the incident to the appellant's commander who notified the Criminal Investigation Command (CID). The commander also advised them to

file a complaint with the New Jersey State Police. A CID agent escorted the women to the nearest state police headquarters where they filed their complaint. The appellant was called into the police headquarters, advised of his rights and made an exculpatory statement. After admitting that he went to the motel, he claimed that the women had enticed him to perform sexual acts with them by dancing and throwing nude photographs of themselves around the motel room. He produced two nude photographs of Dionne which he gave to the investigating officer. He said he took them from the room in case he was falsely accused of a sex offense by the women. Dionne testified that an envelope containing nude photographs of herself disappeared from the motel room after the appellant had been there. She indicated she made the photographs at the request of her husband and kept them in the same drawer as his papers. Both she and Audra denied the appellant's version of the incident. We are satisfied, as were the triers of fact, that the women's version of what happened was more credible than that reflected in the appellant's statement to the state police. Accordingly, the evidence is sufficient as a matter of law and fact to prove that the appellant committed the offenses beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

The appellant has also attacked his conviction of rape on the grounds that there was a fatal variance between the date alleged in the specification and the proof established at trial. He further contends that he was prejudiced as his alibi defense, which was rejected by the court-martial, related to the date alleged in the specification. The charge reflects that the rape was committed on 20 October 1989. The government's witnesses testified that it may have occurred as early as 21 September but was not reported until 20 October.[1]

[1] The trial was held ten months after the incident. This apparently affected the ability of witnesses to precisely remember the date the offense was committed.

The government argues that a variance between the date alleged and the date proven by the evidence is not fatal where time is not of the essence, does not change the nature of the offense, alter the maximum punishment, or offend notice or double jeopardy considerations. *United States v. Freeman*, 23 M.J. 531 (A.C.M.R. 1986), *pet. denied*, 26 M.J. 290 (C.M.A. 1988). We hold that the variance surrounding the rape charge in this case is not fatal when measured by the foregoing criteria. In the first place, a difference of four weeks is not sufficiently substantial to imply that the appellant was misled. *United States v. Dotson*, 27 C.M.R. 596 (A.B.R. 1958). Second, there was more than ample evidence to establish that the appellant had notice of the specific incident to which the charge related to enable him to defend against it. Third, the finding is sufficiently accurate as to time to protect the appellant from another trial for the same offense. *United States v. Sell*, 11 C.M.R. 202 (C.M.A. 1953). Finally, the appellant did not object or otherwise move for appropriate relief to complain about indefiniteness. Normally, this constitutes waiver. *United States v. Karl*, 12 C.M.R. 183 (C.M.A. 1953).

The appellant also contends there was insufficient evidence to support his conviction of the specifications alleging discrediting conduct. The specifications alleged that appellant had discredited the service by violating three New Jersey criminal statutes by possessing an unlicensed handgun, possessing hollow-point bullets for the gun, and by driving a vehicle on a suspended license. We disagree in part.

On 15 October 1989, a New Jersey state trooper on patrol observed an automobile stopped on the shoulder of an interstate highway with its emergency signals flashing. There was no evidence that the vehicle's engine was running. The trooper stopped to render assistance. When he approached the vehicle, he observed three individuals asleep and an empty pistol holster on the rear seat. He confronted the appellant, who was

in the driver's seat, and the appellant promptly admitted ownership of the holster. He further advised the trooper that he had a loaded nine-millimeter pistol in the car, that he was in "the military," and that he was authorized to carry the weapon by military authorities. The trooper seized the pistol, which was loaded, and an additional ammunition clip from the vehicle and directed the appellant to follow his patrol car to a police station.

Telephone calls to military authorities revealed that the appellant was not authorized to carry a pistol. A computer records check established that the appellant had not registered the weapon with the State of New Jersey. The bullets seized from the automobile included ball and hollow-point types. Further investigation revealed that the appellant's driver's license, issued by the State of Florida, had been suspended for nonpayment of traffic violations. In New Jersey, it is a crime to possess an unlicensed pistol and hollow-point bullets. New Jersey also proscribes driving on a suspended license.

We are mindful of the Court of Military Appeals' decision in *United States v. Sadler*, 29 M.J. 370 (C.M.A. 1990), holding that service members may not be found guilty of violating Article 134, UCMJ, solely because their conduct violates state law. Unless the acts are, by their nature, discrediting, the circumstances under which they were committed must be examined before such a determination may legitimately be made. *United States v. Davis*, 26 M.J. 445 (C.M.A. 1988); *United States v. Lowe*, 16 C.M.R. 228 (C.M.A. 1954); *United States v. Dallman*, 32 M.J. 624 (A.C.M.R.), *pet. granted*, 34 M.J. 15 (C.M.A. 1991). Assuming, without deciding, that the appellant's acts are not inherently discrediting, we hold that his possession of an unregistered weapon and hollow-point bullets, in a vehicle on a public highway and in violation of New Jersey law, is discrediting to the armed forces under the circumstances of this case. *See United States v. Greene*, 34 M.J. 713 (A.C.M.R.

1992). Although the appellant told the trooper about the pistol and bullets without first being asked, we conclude he took this action because he knew the holster had been discovered and there was a likelihood the trooper would discover the pistol and bullets through additional investigation. The appellant's misrepresentation to the trooper that he was authorized to possess the weapon by military authorities was a weak and abortive effort to deflect further inquiry into his misconduct. Such false assertion of a military justification for criminal behavior tends to reflect unfavorably upon the integrity of all servicemembers.

We need not decide whether appellant's alleged driving on a suspended license was discrediting under the circumstances. The record failed to establish that the appellant was operating the automobile within the meaning of military law at the time he was confronted by the state trooper. Operating a vehicle means "setting of its motive power in action or the manipulation of its controls" to cause it to move. *See* Manual for Courts-Martial, United States, 1984, Part IV, para. 35(c)(2). The fact that the appellant was in the drivers' seat without the motor running is insufficient to establish that he was operating the vehicle.[2] Accordingly, we will dismiss this specification. In view of the insignificance of this offense relative to the others of which the appellant was convicted, we determine no sentence relief is warranted.

We have considered the matters submitted by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) and find them to be without merit.

The court affirms only so much of the finding of guilty of the Specification of the Additional Charge as provides that the

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[2] Although the appellant drove the vehicle to the police station, it was pursuant to the trooper's orders and this does not constitute a violation of the statute. *See* R.C.M. 916(d).

appellant engaged in conduct discrediting to the armed forces by possessing on a public highway an unlicensed, loaded handgun, and hollow-point bullets in violation of New Jersey state law. The remaining findings of guilty and the sentence are affirmed.

Senior Judge JOHNSON and Judge GRAVELLE concur.

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No. 93-771

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In the Supreme Court of the United States

OCTOBER TERM, 1993

MICHAEL H. HUNT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether notice of an alibi defense, without more, requires the government to prove that an offense charged "on or about" a date in fact occurred on that date.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-10a, is reported at 37 M.J. 344. The opinion of the Army Court of Military Review, Pet. App. 11a-17a, is reported at 34 M.J. 779.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 18, 1993. The petition for a writ of certiorari was filed on November 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

STATEMENT

Following a general court-martial at Fort Dix, New Jersey, petitioner was convicted of rape, larceny, two counts of assault, adultery, and engaging in conduct of a nature to bring discredit upon the Armed Forces by possessing on a public highway an unlicensed, loaded handgun and hollow-point bullets in violation of New Jersey state law, and by operating a motor vehicle on a suspended license, in violation of Uniform Code of Military Justice (UCMJ) Articles 120, 121, 128, and 134, 10 U.S.C. 920, 921, 928, 934. Petitioner was sentenced to confinement for 14 years, a dishonorable discharge, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved the findings and sentence. The Army Court of Military Review set aside the conviction for driving on a suspended license, but otherwise affirmed the findings and the sentence. Pet. App. 11a-17a. Upon discretionary review, the Court of Military Appeals affirmed. *Id.* at 1a-10a.

1. One evening between late September and mid-October 1989, Private Kimberly Cooper and Private Mary Brownell left their company area without authority in order to purchase cigarettes at a local inn. At the inn, the two trainees were approached by petitioner, who ascertained their military status and promised not to report their unauthorized absence. Cooper and Brownell accepted petitioner's offer to give them a ride back to their barracks. Petitioner switched vehicles and made the two trainees remove their military headgear to decrease the likelihood of their being noticed. He drove to a liquor store, parked the car, covered the windshield with a visor, and drank alcoholic beverages in the parked car with the trainees. Pet. App. 3a.

Petitioner told the trainees that he was in the military and said he was "in intelligence." At one point, petitioner leaned over and kissed Cooper, who was surprised but did not resist. Petitioner subsequently drove the trainees to a parking lot near their barracks and suggested that Brownell check to see if the barracks door was locked for the evening. Cooper told Brownell she would soon follow. Pet. App. 3a-4a.

Once Brownell was gone, petitioner and Cooper resumed kissing. Petitioner unbuttoned Cooper's pants and began fondling her genital area. He then moved to her side of the car, put his weight on her chest, trapped her arms and said, "[j]ust let me stick it in." Cooper repeatedly said "no" and told petitioner to get off her. As she cried and implored him to stop, petitioner forced himself on her and had sex with her. Pet. App. 4a.

Brownell returned to the vehicle ten minutes later and knocked on the tinted window. As she was walking away, Cooper "stumbled out" of the car. Cooper looked disheveled and appeared to be fixing her uniform. Cooper repeatedly exclaimed "Oh, my God" as she ran to the barracks and became physically ill. She lay on her bunk and repeatedly said "Oh, my God. Oh, my God" and "He wouldn't get off, He wouldn't get off. I told him to stop and he wouldn't stop." Cooper later told Brownell that petitioner had had sex with her while she resisted. Pet. App. 4a.

Cooper and Brownell did not report the incident until October 20, 1989. Pet. App. 4a; Tr. 257-258, 291, 339-340. At the preliminary hearing held pursuant to Article 32, UCMJ, 10 U.S.C. 832,[1] Cooper testified that the rape

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[1] Article 32 provides that no charges can be referred to a general court-martial until there has been a thorough and impartial hearing on all matters set forth in the charge. The accused has the

occurred "three o[r] four weeks before [Thanksgiving]." See Art. 32, UCMJ, Investigation Report 6. However, in a sworn statement made on October 20, 1989, which was considered by the Article 32 hearing officer, Cooper reported that the rape had occurred "3 weeks or so" prior to October 20th. GX 4; Art. 32, UCMJ Investigative Report 30. At trial, Cooper was unsure of the precise date of the rape, but estimated that it happened between the middle and the end of October. Tr. 318-319, 338-340. She was resolute in her testimony that, whatever the actual date, the rape occurred three weeks prior to the date that she reported it. Tr. 339-340.

Brownell testified at the Article 32 hearing that the rape occurred in October. Art. 32, UCMJ, Investigation Report 10. At trial, she testified that the incident happened three weeks earlier than the date she made her sworn statement on October 20, 1989. Tr. 291; Pet. App. 8a-9a & n.2. Other witnesses placed the date of the rape between late September and late October. Tr. 233, 243-245.

2. Prior to trial, defense counsel gave notice of an alibi for October 20, 1989, as required by Rule 701(b)(1) of the Rules for Courts-Martial. Petitioner presented an alibi from 7:00 p.m. on October 20, 1989, to 2:00 a.m. on October 21, 1989. Tr. 414-419. That was the time of day during which, according to Brownell and Cooper, the

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right to be informed of the charges against him, to be present during the hearing, to be represented by counsel, to be informed of the witnesses that the prosecution expects to call, to be informed of the identity of his accuser, to cross-examine the witnesses, and to present evidence in his defense. He may also present evidence that would mitigate the severity of the offenses. The accused has the right to have defense counsel appointed to assist at an Art. 32 hearing. Art. 38, UCMJ, 10 U.S.C. 838; *Manual for Courts-Martial, United States—1984*, Rule for Courts-Martial 405(f) and (g).

rape occurred. Pet. App. 8a n.2. The court-martial panel members rejected petitioner's defense and found him guilty of raping Cooper.

3. On February 28, 1992, the Army Court of Military Review set aside petitioner's conviction for driving on a suspended license, but affirmed the remaining findings and sentence. Pet. App. 16a-17a. That court held that the variance between the pleading and the proof concerning the rape was not fatal for four reasons: First, the court found that a four-week difference is not sufficiently substantial to imply that petitioner was misled. *Id.* at 14a. Second, the court found "more than ample evidence" to establish that petitioner had notice of the specific incident to which the charge related to enable him to defend against it. *Ibid.* Third, the court found that the finding would protect petitioner from another trial for the same offense. *Ibid.* Finally, the court relied upon the fact that petitioner did not object or otherwise move for appropriate relief or complain about indefiniteness. *Ibid.*

4. A unanimous Court of Military Appeals affirmed on the two issues on which it granted review. Pet. App. 1a-10a. First, it held that there was no material variance since petitioner was charged with rape "on or about" October 20, 1989, and the evidence proved that the rape occurred within three weeks of October 20, 1989. *Id.* at 7a-8a. Second, the court held that even if a material variance occurred, it did not prejudice petitioner. *Id.* at 8a. The court noted that the record does not show that petitioner was surprised by the variance, as the state of the government's proof was readily apparent from the witness testimony and other evidence presented at the Article 32 hearing, at which petitioner was represented by counsel. *Id.* at 8a-9a. The court also observed that petitioner did not move for a more specific charge or request

a continuance to prepare a new defense. *Id.* at 9a. The court concluded that petitioner's "attempt to use his pretrial notice of alibi to bind the prosecution to a date which it did not particularly allege, and then claim surprise, is to no avail." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 4-13) that there was a fatal variance between the date that the rape was charged to have occurred and the date on which it was proved at trial.

1. This Court has long recognized that a charging instrument is adequate so long as it provides the accused notice of the charge and protects him against another prosecution for the same offense. *Berger* v. *United States*, 295 U.S. 78, 82 (1935); see also *Ledbetter* v. *United States*, 170 U.S. 606, 612-613 (1898). Therefore, a charging instrument that alleges that an offense occurred "on or about" a certain date is adequate to put the defense on notice that the charge is not limited to the specific date listed. *United States* v. *Reed*, 887 F.2d 1398, 1402-1403 (11th Cir. 1989), cert. denied, 493 U.S. 1080 (1990); *United States* v. *Leibowitz*, 857 F.2d 373, 378-379 (7th Cir. 1988), cert. denied, 489 U.S. 1088 (1989). So long as the government proves that the crime occurred on a date reasonably close to the date appearing in the charge, there is no material variance as a matter of law unless proof of the particular date is an element of the offense or the defendant is otherwise prejudiced. Pet. App. 7a; *Reed*, 887 F.2d at 1403; *United States* v. *Nersesian*, 824 F.2d 1294, 1323 (2d Cir.), cert. denied, 484 U.S. 957 (1987). Even where the variance is material, a defendant may obtain reversal only on a showing that he suffered substantial prejudice as a result. See, *e.g.*, *United States* v. *Duke*, 940 F.2d 1113, 1119-1120 (8th Cir. 1991); *Nersesian*, 824

F.2d at 1323; *United States* v. *Cochran*, 697 F.2d 600, 604 (5th Cir. 1983); *United States* v. *Arteaga-Limones*, 529 F.2d 1183, 1193 (5th Cir.), cert. denied, 429 U.S. 920 (1976). A defendant is not prejudiced merely because the government is unable to prove the exact date on which an offense occurred and the defendant contends he has an alibi for some part of the period during which the government contends it might have occurred. See *Reed*, 887 F.2d at 1403; *Leibowitz*, 857 F.2d at 378; *United States* v. *Schurr*, 775 F.2d 549, 559 (3d Cir. 1985); *United States* v. *King*, 703 F.2d 119 (5th Cir.), cert. denied, 464 U.S. 837 (1983); *United States* v. *Creamer*, 721 F.2d 342 (11th Cir. 1983). Cf. *United States* v. *Phillips*, 869 F.2d 1361, 1369 (10th Cir. 1988).[2]

2. The Court of Military Appeals' decision in this case is entirely consistent with the above principles. As the court observed, petitioner "was not charged with rape on October 20, 1989, but with rape 'on or about October 20, 1989.'" Pet. App. 7a. Since the evidence showed that the rape occurred within three weeks of October 20, 1989, the court properly found no material variance. *Id.* at 7a-8a.

Moreover, the Court of Military Appeals correctly held that the record in this case demonstrated that petitioner suffered no prejudice from the reference to Octo-

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[2] Petitioner incorrectly characterizes (Pet. 9) the decision in *United States* v. *Goodrich*, 493 F.2d 390, 393 (9th Cir. 1974). The language cited by petitioner as the Ninth Circuit's holding in *Goodrich* is in fact a recitation by that court of petitioner's argument based upon state case law authorities. In *Goodrich*, the indictment charged that the offense occurred "on" a specific date, rather than, as here, that the offense occurred "on or about" that date. Accordingly, the *Goodrich* court had no occasion to address the question of whether a trial court must instruct the jury as to a specific date rather than giving an "on or about" instruction when an alibi defense is raised.

ber 20 in the charge. Pet. App. 8a. The "on or about" language used in the charge, coupled with the evidence and testimony presented at the Article 32 hearing, made clear the period during which the government alleged that the offense occurred. Pet. App. 8a. The pretrial statements in which Cooper and Brownell initially reported the offense were made on October 20, 1989, and refer to the rape as having occurred some three weeks earlier. *Id.* at 8a-9a & n.2. Therefore, the statements put the defendant on notice that the rape could not have occurred on October 20, 1989, and that the government was not claiming that it had.

Finally, petitioner's conduct of the trial further demonstrated that his defense was not prejudiced. As the Court of Military Appeals observed, applicable rules of procedure provide that "[i]f the defense needs more detail as to the * * * date * * * of the offense * * * it should request a bill of particulars." Rule for Courts-Martial 701(b)(1), Discussion; see Pet. App. 9a. Petitioner did not move for a more specific charge, nor did he request a continuance during trial to prepare his response to any unexpected evidence, *Id.* at 9a, 14a, factors that support the conclusion that he was not prejudiced. See *United States* v. *Somers*, 496 F.2d 723, 746 & n.42 (3d Cir. 1974).

4. Petitioner contends that some state courts have found that the date of an offense becomes material when an alibi defense is presented. Pet. App. 10a-12a. Many of those cases, however, do not announce a *per se* rule, but review the facts to determine whether time is material. That approach is similar to the approach taken by federal courts in their fact-based prejudice test. Moreover, none of the cases involved a factual situation in which the risk of unfair surprise was as illusory as it was in this case. Here, the offense was charged as occurring "on or about"

a certain date, the pretrial evidence available to petitioner set that date with reasonable certainty, and petitioner presented an alibi defense for a date on which the pretrial hearing evidence showed that it could not have occurred. Finally, none of the state cases cited by petitioner (Pet. 10-12) applied principles of federal law. Accordingly, there is no conflict between the state court decisions cited by petitioner and the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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